92-1283

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GREGORY LAHAY,
Petitioner,
v.
BILL ARMONTROUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 1993

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58 pp

QUESTION PRESENTED

1. Whether the Eighth Circuit Court of Appeals' standard of review failed to properly apply the constructive denial aspect of *Strickland v. Washington* in violation of Petitioner's constitutional rights.

LIST OF INTERESTED PARTIES

The following were parties to the proceeding in the Eighth Circuit Court of Appeals:

Bill Armontrout (Respondent); and Gregory Lahay (Petitioner).

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B. In *Lahay I*, the Eighth Circuit remanded Petitioner's case to determine if Petitioner was constructively denied counsel under *Strickland*.

C. On remand, Magistrate Bahn considered the exact same testimony of counsel and ignored the purpose of the remand. The Eighth Circuit Court of Appeals then failed to follow its own instructions on remand and affirmed the Magistrate's findings.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Decision of the Eighth Circuit Court of Appeals sought to be reviewed in this case is reported at 974 F.2d 979 (8th Cir. 1992) and is reproduced in its entirety beginning at page 1a in the Appendices to this Petition.

The District Court's opinion on remand adopting the Magistrate's Report and Recommendation is unreported and is reproduced in its entirety beginning at page 7a in the Appendices to this Petition. The Magistrate's Report and Recommendation is unreported and is reproduced in its entirety beginning at page 11a in the Appendices to this Petition.

The Decision of the Eighth Circuit Court of Appeals reversing and remanding this case is reported at 923 F.2d 578 (8th Cir. 1991) and is reproduced in its entirety beginning at page 18a in the Appendices to this Petition.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Eighth Circuit Court of Appeals was entered on September 8, 1992. The Petition for Rehearing was denied on November 2, 1992. This Petition has been timely filed in accordance with Rule 6.1(a) of the Rules of this Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution - Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF CASE

Petitioner, Gregory Lahay, is in the custody of the Warden of the Missouri State Penitentiary in Farmington, Missouri pursuant to a judgment rendered by the Circuit Court of St. Louis County on January 10, 1984. Petitioner was convicted of first-degree burglary, second-degree assault, stealing without consent, and armed criminal action. He was sentenced as a persistent offender to concurrent sentences of 10 years, 15 years, 30 years, and life imprisonment. The judgment and sentence were affirmed by the Missouri Court of Appeals. *State v. Lahay*, 687 S.W.2d 604 (Mo. App. 1985). Petitioner filed a Motion for Post-Conviction Relief under Missouri Supreme Court Rule 27.26, which was denied. The Missouri Court

of Appeals affirmed the denial of Petitioner's Rule 27.26 Motion. *Lahay v. State*, 752 S.W.2d 65 (Mo. App. 1985).

Prior to the trial of the case, after Petitioner's appointed counsel, Mr. Bob Babbione, withdrew, the state appointed Mr. Jack Walsh to represent Petitioner. Mr. Walsh consulted with Petitioner one time, for approximately 30 minutes, prior to the four-count felony trial. Mr. Walsh failed to investigate the use of a possible alibi witness who had been interviewed and endorsed as an alibi witness by Mr. Babbione. In fact, the file contained the alibi witness' statement providing exculpatory evidence; the same evidence presented by the alibi witness at the hearing before the Honorable Magistrate William S. Bahn on remand. Petitioner was constructively denied counsel because Mr. Walsh (1) failed to investigate the case thoroughly and gather enough facts and information to represent Petitioner, (2) met with Petitioner only once for a period of thirty minutes, and (3) neither investigated nor called a potential alibi witness, whose testimony would have provided exculpatory evidence.

Mr. Walsh testified at Petitioner's state "27.26" hearing, but failed to provide any tangible evidence to support his assertions that he consulted with Petitioner on at least four occasions and thoroughly investigated the potential use of the alibi witness. On May 23, 1987, Petitioner, together with two other former clients of Mr. Walsh, including Mr. Phillip Taylor, filed a complaint with the Ethics Committee of the Missouri Bar Association alleging Mr. Walsh committed perjury, regarding his performance as counsel, at

each of their respective "27.26" hearings.[1] On or about January 15, 1988, Mr. Walsh surrendered his license to the Missouri Bar Association.

Petitioner filed a Petition for Writ of Habeas Corpus with the United States District Court for the Eastern District of Missouri claiming, in part, he was denied effective assistance of counsel in violation of his constitutional rights because his appointed trial counsel failed to properly consult with him and failed to investigate an alibi witness. The petition was denied by the Honorable William L. Hungate on November 3, 1989. On appeal, the Eighth Circuit vacated the District Court's dismissal of Petitioner's petition because conditions existed casting doubt on the reliability of the "27.26" hearing, including Mr. Walsh's disbarment and lack of evidence supporting his testimony refuting the ineffective assistance claim. *Lahay v. Armontrout*, 923 F.2d 578 (8th Cir. 1991) ("*Lahay I*"). Indeed, the *Lahay I* court stated if Petitioner's allegations were true, he may have been constructively denied counsel altogether.

After an evidentiary hearing, the Honorable Magistrate William S. Bahn recommended a denial of Petitioner's Writ of Habeas Corpus. Magistrate Bahn recommended dismissal of Petitioner's petition even though Mr. Walsh's testimony conflicted with Petitioner's testimony and the testimony of the alibi witness, and in spite of Mr. Walsh's failure to produce any evidence, records, notes, etc. to substantiate any of his testimony. In other words, Magistrate Bahn accepted and relied on the exact same testimony which, according to the Eighth Circuit, cast doubt on the reliability

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[1] Mr. Taylor also filed a Petition for Writ of Habeas Corpus based on Mr. Walsh's representation at his criminal trial. Mr. Taylor claimed Mr. Walsh failed to consult with him and failed to investigate potential witnesses. The Eighth Circuit vacated the District Court's dismissal of Mr. Taylor's petition because conditions existed casting doubt on the reliability of the "27.26" hearing; the same conditions requiring the remand in the present case. The same conditions upon which the District Court eventually granted Mr. Taylor's Writ of Habeas Corpus exist in the present action.

of the "27.26" hearing, and created the significant possibility that Petitioner was constructively denied counsel.[2] The Honorable William L. Hungate adopted the findings of Magistrate Bahn and denied Petitioner's Writ of Habeas Corpus on July 30, 1991.

On August 28, 1991, Petitioner filed his Notice of Appeal in the United States Court of the Appeals for the Eighth Circuit. After oral argument, a different panel of the Eighth Circuit affirmed the judgment of the District Court on September 8, 1992. On October 5, 1992, Petitioner filed a Petition for Rehearing which was denied by the Eighth Circuit on November 2, 1992.

EXISTENCE OF JURISDICTION BELOW

The Eighth Circuit Court of Appeals had jurisdiction over this matter pursuant to 28 U.S.C. § 2253.

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[2] The magistrate assigned to the Phillip Taylor case, however, followed the remand instructions and granted Mr. Taylor's Writ because Mr. Walsh failed to produce any evidence to substantiate his testimony, the same testimony he proffered at Mr. Taylor's "27.26" hearing.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

In order to obtain a writ of habeas corpus, a petitioner must show he was denied effective assistance of counsel, and, as a result, prejudiced. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* further holds that prejudice is presumed where a petitioner is constructively denied counsel. Petitioner in the present action meets the *Strickland* test of constructive denial of counsel on two levels. First, the Eighth Circuit held in *Lawrence v. Armontront*, 900 F.2d 127 (8th Cir. 1990), *appeal after remand*, 961 F.2d 113 (8th Cir. 1992), as the *Lahey I* panel held in Petitioner's own case, that the Petitioner's counsel's lack of credibility regarding the investigation of an alibi witness and consultation with his client supported the conclusion Petitioner was constructively denied counsel. Specifically, the Eighth Circuit found Mr. Walsh's testimony unreliable because he had been disbarred, accused of perjury, and failed to provide any tangible evidence to support any of his testimony. Moreover, in a very similar case involving Phillip Taylor, on similar remand instructions, another judge of the same district court found Mr. Walsh's testimony unreliable. *Taylor v. Armontrout*, No. 89-2604, Slip. Op. (915 F.2d, 1576 (Table) (8th Cir. 1990)) Accordingly, the first panel of the Eighth Circuit in *Lahey I* remanded the matter to assess the credibility of Petitioner's counsel, in light of the very real possibility of constructive denial of counsel.

On remand, Petitioner presented evidence showing Mr. Walsh, did not investigate the potential use of Mr. Kevin Cole as an alibi witness, and, subsequently, did not call him as a witness, despite being told by Petitioner of the substance of Mr. Cole's testimony, possessing a statement by Mr. Cole outlining his testimony, and possessing Mr. Babbione's endorsement of Mr. Cole as an alibi witness. Mr. Walsh testified he contacted Mr. Cole once

by telephone and determined that, in his view based upon that telephone conversation, Mr. Cole would commit perjury. Mr. Walsh presented no evidence supporting his testimony and it was flatly contradicted by the testimony of Mr. Cole, Petitioner, and Mr. Cole's statement contained in the file. Mr. Walsh's testimony regarding the alibi witness was identical to that giving rise to the remand.

Second, although Mr. Walsh contended he met with Petitioner on a number of occasions, the documentary evidence produced at the evidentiary hearing on remand -- the jail's log of visitors, authenticated by the jail's assistant administrator, showed Mr. Walsh met with Petitioner only once for a period of approximately thirty minutes. The singularness and brevity of Mr. Walsh's visit amounted to no representation at all for Petitioner.

The remand was simply an effort to determine if Petitioner was constructively denied counsel. To accomplish this evaluation, Mr. Walsh's credibility had to be assessed through tangential evidence. However, Magistrate Bahn ignored the basic purpose of the remand. Magistrate Bahn received, and erroneously accepted, exactly the same testimony giving rise to the remand. The Magistrate and the second panel of the Eighth Circuit failed to evaluate the case properly under the *Strickland* standard. The Magistrate and the second Eighth Circuit panel did not analyze the facts of this case under the constructive denial aspect of *Strickland*, but instead simply jumped to the prejudice prong of the traditional *Strickland* test.

In the final analysis, Magistrate Bahn denied Petitioner's Writ based on testimony the first Eighth Circuit panel had already determined to be unreliable and testimony the first Eighth Circuit panel already determined gave rise to an inference of constructive denial of counsel; testimony startlingly similar to that resulting in the District Court granting Mr. Taylor's Writ under the *Strickland*

constructive denial test. Petitioner's constitutional rights under the Sixth Amendment were violated because Magistrate Bahn and the second Eighth Circuit panel failed to evaluate properly the actions of Mr. Walsh under the *Strickland* standard for constructive denial of counsel.

DISCUSSION

I. THE EIGHTH CIRCUIT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS BY REFUSING TO APPLY THE *STRICKLAND* CONSTRUCTIVE DENIAL TEST TO THE PRESENT CASE.

A. Under Strickland, *constructive denial of counsel violates a petitioner's constitutional rights.*

A petitioner claiming ineffective assistance of counsel must show counsel's performance was deficient, resulting in prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). Prejudice, however, is legally presumed, where there is "actual or constructive denial of the assistance of counsel." *Id.* at 692. Similarly, prejudice is presumed where counsel's ineffectiveness renders the adversarial process unreliable. *United States v. Cronic*, 466 U.S. 648, 659 (1984).

A defendant is constructively denied counsel if his attorney fails to confer with him and fails to investigate potential alibi witnesses. *Lahay v. Armontrout*, No. 89-2867, Slip Op. (8th Cir. January 9, 1991) (*Lahay I*) ("If Lahay's assertions of his counsel's failure to confer, investigate witnesses, and allow Lahay to testify have merit, then, at least constructively, Lahay might have been denied counsel altogether . . . ."). It is well settled that an attorney must consult with his client. "Counsel should confer with his client without delay and *as often as necessary* to elicit matters of defense or to ascertain that potential defenses are available." *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973)(emphasis added). Consultation is an important tool for the attorney to use in investigating the facts of the case. *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984), *cert. denied*, 469 U.S. 870 (1984) (habeas relief granted because counsel interviewed no witnesses and communicated only briefly with his client prior to trial). A prisoner's right to have an attorney is more than the right to have someone

standing next to them who happens to be an attorney. *Strickland*, 466 U.S. at 685. Similarly, an attorney acting reasonably on his client's behalf will investigate alibi witnesses brought to his attention by his client. *Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir. 1990), *appeal after remand*, 961 F.2d 113 (8th Cir. 1992) (case remanded to determine if prejudice existed by demonstrating the alibi witnesses would have testified if asked and their testimony would have supported the defendant's alibi).

In Petitioner's case, counsel completely failed to properly consult with his client or investigate the alibi witness, who was willing to testify and whose testimony was exculpatory. Mr. Walsh visited the Petitioner one time for approximately 30 minutes prior to the four-count felony trial. Petitioner was constructively denied counsel because Mr. Walsh was not in possession of enough information and facts to defend him properly. One visit, lasting 30 minutes, falls well below any objective standard for the duty of an attorney to consult with his client. *DeCoster*, 487 F.2d 1197. Moreover, although an alibi witness was brought to Mr. Walsh's attention by Petitioner and the file contained an endorsement of the alibi witness by Petitioner's previous counsel, at best Mr. Walsh claims, without providing any corroborating evidence, to have rejected the alibi witness after a single telephone conversation, without any evidence of any follow-up investigation. Petitioner produced the alibi witness, Mr. Kevin Cole, at the evidentiary hearing and he testified (1) Mr. Walsh never contacted him, (2) he would have testified at the original criminal trial if asked, and (3) he was moving furniture with Petitioner at the time the alleged crime occurred.

B. *In* Lahay I, *the Eighth Circuit remanded Petitioner's case to determine if Petitioner was constructively denied counsel under* Strickland.

The first Eighth Circuit panel originally remanded the case for an independent determination of whether, under the facts, Petitioner was constructively denied counsel. *Lahay I*, 923 F.2d at 578. The matter was remanded to determine specifically whether Petitioner's assertions regarding the failure of Mr. Walsh to investigate the alibi witness had merit and whether Petitioner's assertions regarding the lack of consultation were true. *Id.*

The Eighth Circuit panel initially considering Mr. Walsh's credibility examined his testimony at Petitioner's "27.26" hearing. The court found Mr. Walsh's testimony unreliable because, among other reasons, he was disbarred, accused of committing perjury, and he failed to produce any evidence to support his testimony. The Court's opinion in *Lahay I* remanding the matter evidences the concern that Mr. Walsh's previous testimony was unsubstantiated by any tangible evidence and was in direct conflict with Petitioner's testimony.

C. On remand, Magistrate Bahn considered the exact same testimony of counsel and ignored the purpose of the remand. The Eighth Circuit Court of Appeals then failed to follow its own instructions on remand and affirmed the Magistrate's findings.

The evidence adduced at the evidentiary hearing on remand proved Mr. Walsh visited Petitioner one time while he was incarcerated at the St. Louis County Jail. The Petitioner produced an affidavit signed by Jean Hollander, Administrative Assistant at the St. Louis County Jail, which established the authenticity of the Visitor's Register for the period in which Petitioner was incarcerated at the St. Louis County Jail. These sign-in logs verify and corroborate Petitioner's testimony that Mr. Walsh visited him one time in the St. Louis County Jail. Mr. Walsh, on the other hand, testified, both at this evidentiary hearing and at Petitioner's "27.26" hearing, that he had met with Petitioner on at least four occasions.

Mr. Walsh presented no records, notes, calendars, case numbers, time sheets, bills for service, or anything else to substantiate his testimony. Interestingly, Mr. Walsh testified at Mr. Taylor's hearing that he visited Prisoner Taylor on numerous occasions, despite the sign-in logs indicating only one visit; Mr. Walsh failed to produce any evidence to support this testimony in *Taylor* and failed to produce any evidence to support similar testimony in the present case.

On numerous occasions, Petitioner attempted to contact Mr. Walsh, either through letters or telephone calls, in order to get Mr. Walsh to visit him to discuss the case. Mr. Walsh admitted receiving letters and telephone messages from Petitioner and admitted he never wrote to Petitioner nor spoke to him on the telephone. Mr. Walsh's proffered excuse for his failure to contact his client was that his busy schedule did not allow him to return the telephone calls.

Similarly, on remand, before Magistrate Bahn, Petitioner testified he advised Mr. Walsh of the alibi witness, Mr. Cole, who would have testified he was with Petitioner during the time the crime was allegedly committed. The information concerning Mr. Cole was located in Petitioner's file which included Mr. Cole's earlier statement exonerating Petitioner and Mr. Babbione's endorsement of Mr. Cole as an alibi witness. Even with this information, Mr. Walsh made no effort to contact or investigate the potential use of Mr. Cole as an alibi witness.

Petitioner produced Mr. Cole at the evidentiary hearing before Magistrate Bahn. Mr. Cole testified he was with Petitioner from 8:30 a.m. until some time shortly after 5:00 p.m. on the day in which the incident allegedly occurred around 3:30 p.m. Mr. Cole's testimony went completely unrefuted. The state failed to produce any evidence to contradict Mr. Cole's testimony and failed to produce any evidence of bias or reason why Mr. Cole would

commit perjury. Furthermore, Mr. Cole testified he never spoke with Mr. Walsh.

Mr. Walsh testified at the hearing and claimed he contacted Mr. Cole one time on the telephone and determined, based on that single telephone call, Mr. Cole would commit perjury if called to testify. Mr. Walsh failed to produce any phone records, notes or any other evidence to corroborate his easily-fabricated, self-serving story regarding contacting Mr. Cole. Mr. Walsh presented the same testimony he presented at the "27.26" hearing; the very same testimony which raised the first panel's strong doubts regarding the reliability of the "27.26" hearing. Mr. Walsh failed completely to bring forth one shred of tangible evidence supporting his testimony.

Mr. Walsh's representation of Petitioner fell well below any objective acceptable standard. The evidence adduced at the evidentiary hearing before Magistrate Bahn showed Mr. Walsh's failure to consult with Petitioner, to investigate or even contact an alibi witness, and to perform his duties as counsel for the accused. If the evidentiary hearing added anything to this case, it produced evidence supporting the *Lahay I* concern of constructive denial. Yet, despite the instructions and purpose of the remand, Magistrate Bahn simply evaluated the matter under the prejudice prong of *Strickland* and failed even to consider whether Petitioner was constructively denied counsel under *Strickland;* the exact purpose of the remand. Magistrate Bahn, and the second panel of the Eighth Circuit in affirming, did not evaluate the facts under the *Strickland* constructive denial standard. The result is a violation of Petitioner's constitutional rights.

Magistrate Bahn's failure to adhere to the *Strickland* constructive denial standard is made more glaring by the virtually identical case of *Taylor v. Armontrout*, No. 89-472C(3) Slip. Op. (Magistrate's Report and Recommendation, March 7, 1991) (reproduced in its entirety beginning at Page 22a in the Appendices).

Both Taylor and Petitioner claimed Mr. Walsh failed to consult with them, failed to investigate alibi witnesses, and committed perjury at their respective "27.26" hearings. The panel in *Lahay I* cited the prior *Taylor* opinion, *Taylor v. Armontrout*, No. 89-2604, Slip. Op. (915 F.2d, 1576 (Table) (Eighth Cir. 1990)), as instructive. In *Taylor*, on remand, another judge of the District Court sustained a different Magistrate Report and Recommendation and granted Taylor's Writ of Habeas Corpus based on almost identical facts involving the credibility of Mr. Walsh. The Eighth Circuit originally remanded both cases because of concerns with the credibility of Mr. Walsh's testimony at the respective "27.26" hearings. In both cases at the hearings on remand, Mr. Walsh simply restated his previous "27.26" testimony without producing any tangible evidence to corroborate any of his testimony.

In *Taylor*, the Magistrate found Mr. Walsh's testimony not credible because, at least in part, Mr. Walsh failed to produce any corroborative evidence to support his testimony. Under the same circumstances and instructions, the District Court in the present case found Mr. Walsh's testimony credible. How can Mr. Walsh's unsupported testimony be credible as to the Petitioner, but not credible as to Mr. Taylor? Surely it can be no answer to Petitioner that the random assignment of Magistrates to his case determines whether he will spend the rest of his life in prison or finally obtain a fair trial. Clearly, the Eighth Circuit in the present case did not adhere to its own concerns and allowed the same faulty testimony to control the outcome.

D. Petitioner's constitutional rights were violated because the Eighth Circuit refused to apply Strickland *to determine whether Petitioner was constructively denied counsel.*

The second Eighth Circuit panel in the present case took a completely different position from *Lahay I* and *Taylor*, and the result is a degradation of Petitioner's constitutional rights.

Evidencing the sharp deviation in position, in *Lahay I* the court stated:

> If Lahay's assertions of his counsel's failure to confer, investigate witnesses, and allow Lahay to testify have merit, then, at least constructively, Lahay might have been denied counsel altogether and the state proceeding would be unreliable.

Lahay v. Armontrout, 923 F.2d at 579.

Incredibly, the present Eighth Circuit panel concludes:

> Although we have some reservations about the factual findings that Walsh met with Lahay four times before trial, we do not believe that this particular finding is essential to the district court's ultimate conclusion.

974 F.2d 979, 981 (8th Cir. 1992). The very questions at issue in *Lahay I*, questions regarding Walsh's credibility and the interplay with Petitioner's constitutional rights, are now discounted as not being essential. The Eighth Circuit discounts the purpose of the remand and discounts the factual basis supporting Petitioner's assertion he was constructively denied counsel.

As described above, Petitioner was constructively denied effective assistance of counsel and was, as a matter of law, prejudiced thereby. The second Eighth Circuit panel rubber-stamped the findings of Magistrate Bahn, who did not make a proper assessment of Mr. Walsh's credibility under the *Lahay I* remand. Furthermore, both Magistrate Bahn and the second Eighth Circuit panel applied the wrong *Strickland* analysis to achieve the wrong result. The first Eighth Circuit panel expressed specific concerns that the facts of Petitioner's case gave rise to constructive denial of counsel. The Magistrate simply never considered the constructive denial aspect of *Strickland*, and in upholding the Magistrate's

findings, the Eighth Circuit denegrated Petitioner's constitutional rights.

Petitioner respectfully submits that this is not a simple case of differing facts causing different panels of the same Court of Appeals to come to different results under the same legal standard. Petitioner was constructively denied the assistance of counsel through Mr. Walsh's insufficient contact with Petitioner and his complete failure to investigate the alibi witness, Mr. Cole. There can be little doubt that Petitioner's case has been improperly adjudicated: the *Taylor* decision involved another client of Mr. Walsh, startlingly similar unsupported testimony from Mr. Walsh, and a magistrate, district judge and Eighth Circuit panel who properly applied the *Strickland* constructive denial test. Mr. Taylor has his freedom because his Eighth Circuit panel properly applied *Strickland* to his representation by Mr. Walsh; Petitioner is still incarcerated because his second Eighth Circuit panel declined to follow *Strickland*. The *Taylor* decision highlights the need for this Court's review and reversal of Petitioner's case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Dated: January 29, 1993.
Atlanta, Georgia

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 91-3105

GREGORY LAHAY,	*	
	*	
Appellant,	*	
	*	Appeal from the United
v.	*	States District Court for
	*	the Eastern District of
Bill Armontrout,	*	Missouri.
	*	
Appellee.	*	

Submitted: June 10, 1992

Filed: September 8, 1992

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Gregory Lahay, an inmate at the Missouri State Penitentiary in Farmington, Missouri, appeals the denial of his petition for writ of habeas corpus. We affirm.

I. BACKGROUND

The complete facts of this case are set forth in an earlier opinion concerning Lahay's petition. *See Lahay v. Armontrout*, 923 F.2d 578 (8th Cir. 1991). A short summary will suffice here. In 1989, Lahay filed a petition for writ of habeas corpus, challenging his convictions in Missouri state court for various offenses stemming from a burglary. Lahay claimed that he did not receive

effective assistance of counsel. The convictions had been affirmed on direct appeal and on a motion for state post-conviction relief.

Lahay's petition was assigned to a magistrate judge, who recommended denial based on the factual findings of the Missouri state courts. The district court adopted the magistrate's recommendation. Lahay appealed and we vacated the district court's judgment because we found conditions existed that cast doubt on the reliability of the state court's findings of fact. We remanded for further proceedings consistent with our opinion. *Lahay*, 923 F. 2d at 579.

On remand, the matter was again referred to a magistrate judge, who held an evidentiary hearing. At the hearing, Lahay asserted that the performance of his trial attorney, John Walsh, was so deficient as to constitute a constructive denial of counsel. In particular, Lahay asserted that Walsh failed to adequately confer with him before trial, to inform Lahay of his right to testify at trial, and to investigate and call witnesses. To support his claims, Lahay testified at the hearing. Lahay also presented the testimony of one alibi witness, Kevin Cole, and a prior defense counsel, Robert Babbione, who had certified Cole as a potential defense witness.

In response, Missouri presented the testimony of the burglary victim, who again identified Lahay as the perpetrator, and a police officer, who confirmed various aspects of the victim's testimony and stated that Lahay's alleged accomplice, Susan Hilt, had also identified Lahay as the perpetrator. Walsh also testified. Walsh stated that he had Babbione's notes from previous meetings with Lahay and had personally met with Lahay at least four times before trial, informed Lahay of his right to testify, and interviewed Cole by telephone. Regarding his interview with Cole, Walsh testified that Cole said: "What does Greg want me to say—tell me what to say and I'll say it." Based on Cole's willingness to commit perjury, Walsh decided not to call him as an alibi witness. Walsh also

testified that he wished to call Susan Hilt as a witness, but Hilt's attorney refused, noting that she had also been charged in the crime.

Following the hearing, the magistrate judge recommended denial of Lahay's petition. The magistrate judge noted that the evidence against Lahay was "somewhat overwhelming" and did not find Lahay's testimony concerning Walsh's representation credible. The magistrate judge concluded "that despite the fact that Walsh was not a totally effective counsel . . . Walsh's performance was not so deficient as to require a presumption that Lahay was prejudiced at trial." Magistrate Judge's Review and Recommendation at 6-7. After conducting a de novo review of the evidence, the district court adopted the recommendation of the magistrate judge and denied Lahay's petition.

II. DISCUSSION

On appeal, Lahay contends that the district court erred in adopting the magistrate judge's findings of fact. We disagree. To present a successful claim for ineffective assistance of counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). As to the performance of counsel, we have noted that "[t]here is a 'wide range' of reasonable professional assistance. A court must avoid second-guessing trial strategy. Accordingly, [a petitioner] must overcome a 'strong presumption' that his counsel's actions constituted reasonable trial strategy under the circumstances." *Sanders v. Trickey*, 875 F.2d 205, 207 (8th Cir.), *cert. denied*, 493 U.S. 898 (1989) (citing *Strickland*, 466 U.S. at 689). Because a claim of ineffective assistance of counsel presents a mixed question of law and fact, we conduct an independent review of the district court's conclusions. *E.g., Porter v. Lockhart*, 925 F.2d 1107, 1109 (8th Cir.), *cert.*

denied, 111 S. Ct. 2902 (1991). We review the district court's factual findings, however, under the clearly erroneous standard. *E.g., id.*

Lahay initially contends that the district court erred in concluding that Walsh adequately conferred with him before trial. Although we have some reservations about the factual finding that Walsh met with Lahay four times before trial,[1] we do not believe that this particular finding is essential to the district court's ultimate conclusion. Lahay is unable to show any deficiency in Walsh's performance related to the number of times Walsh met with him. Lahay admits that Walsh met with him twice and had access to Babbione's file, which included notes from Babbione's previous meetings with Lahay. Moreover, Lahay testified at the evidentiary hearing that he told Walsh everything he knew about the case. Viewing the circumstances as a whole, we believe that regardless of how many times Walsh met with Lahay, the district court did not err in concluding that Walsh adequately conferred with Lahay before trial.[2]

Lahay next contends that the district court erred in concluding that Walsh advised him of his right to testify at trial. The district court relied on the magistrate judge's determinations regarding the credibility of the witnesses. We have reviewed the record and find no basis to conclude that the district court erred in relying on the magistrate judge.

---

[1] Walsh testified that he met with Lahay at a pretrial hearing and three other times while Lahay was detained pending trial. Jail records, however, show only one visit.

[2] Lahay asserts that another criminal defendant represented by Walsh was granted habeas corpus based on a similar claim and offers the following citation: *Taylor v. Armontrout*, No. 89-472C(3) slip op. (8th Cir. Feb. 7, 1991). We are unable, however, to find any such opinion. Even assuming Lahay merely made a citation mistake, the result in *Taylor* would not alter our analysis here. When evaluating a claim of ineffective assistance of counsel, the court must consider the particular circumstances of a case. Lahay is not entitled to the writ simply because another client of Walsh's was able to secure relief on similar grounds in an unrelated case.

Finally, Lahay contends that the district court erred in concluding that Walsh adequately investigated alibi witnesses. The district court again relied on the magistrate judge's credibility determinations. Lahay, however, asserts that the magistrate judge invaded the province of the jury in assessing Cole's credibility. Lahay supports his position by citing cases which hold that an attorney's complete failure to investigate an alibi witness entitles a petitioner to a new trial if the uncalled alibi witness would have testified and the testimony would have been favorable to the petitioner. *See, e.g., Grooms v. Solem*, 923 F.2d 88, 91 (8th Cir. 1991); *Lawrence v. Armontrout*, 900 F.2d 127, 129-30 (8th Cir. 1990).

Lahay ignores that in the present case, Walsh claims to have investigated the alibi witness. The focus here, therefore, is not whether a jury would have found Cole credible, but whether Walsh investigated Cole and had a reasonable basis for not calling Cole as an alibi witness. As fact-finder for the habeas proceeding, the magistrate judge properly assessed the credibility of the different witnesses in resolving this issue. After reviewing the record, we believe that the district court neither erred in adopting the magistrate judge's credibility determinations nor in concluding that Walsh investigated Cole and had a reasonable basis for not calling him as a witness.[3]

---

[3] Lahay also claims that Walsh failed to adequately investigate other potential alibi witnesses. Lahay, however, did not call any of these witnesses at the habeas hearing and failed to present any evidence concerning their potential trial testimony other than his own assertions. Consequently, Lahay has failed to demonstrate any prejudice even if Walsh's performance was deficient as to these witnesses. *See Sanders*, 875 F.2d at 210.

III. CONCLUSION

For the reasons stated above, we affirm the district court's denial of Lahay's petition for writ of habeas corpus.

A true copy.

Attest: [Michael E. G____]

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GREGORY LAHAY,	)	
	)	
Petitioner,	)	
	)	No. 89-0469C(3)
v.	)	
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court on the petition of Gregory Lahay for writ of habeas corpus.

Pursuant to 28 U.S.C. § 636(b), this Court referred all pretrial matters to United States Magistrate Judge William S. Bahn. In his review and recommendation of September 18, 1989, Magistrate Bahn found that the factual findings of the Missouri state courts were entitled to a presumption of correctness, that Lahay failed to prove his counsel was ineffective, and that Lahay could not obtain federal habeas relief based on his claim that the state knowingly used perjured testimony by his counsel in the Rule 27.26 hearing. On November 3, 1989, this Court adopted the Magistrate's findings and dismissed the petition with prejudice. After Lahay filed an appeal, the Eighth Circuit held:

> While the district court perhaps correctly found Lahay's claim that counsel committed perjury such that Lahay did not receive a fair Rule 27.26 hearing is not a basis for federal habeas relief, lack of fair hearing will rebut the presumption of correctness of the state court's factual

findings. 28 U.S.C. § 2254(d)(6). If conditions exist casting doubt on the reliability of the state court findings of fact, the presumption of correctness may be rebutted, and the petitioner is entitled to an evidentiary hearing to review the findings. *Richmond v. Ricketts*, 774 F.2d 957, 961-62 (9th Cir. 1988); *Laws v. Armontrout*, 863 F.2d 1377, 1381 (8th Cir. 1988). We find the requisite conditions exist in the circumstances of trial counsel's disbarment and Lahay's challenge of counsel's statements.

> A petitioner claiming ineffective assistance of counsel must show that not only was counsel's performance deficient, but also that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). Prejudice may be presumed, however, if there has been a constructive denial of counsel altogether, *id.* at 692, or if counsel's performance renders the adversarial process unreliable. *Chadwick v. Green*, 740 F.2d 897, 900 (1984) [sic].

Taylor v. Armontrout, No. 89-2604, slip op. at 3 (8th Cir. July 11, 1990).

This court is considerate of the same concerns expressed in the above-cited case because Taylor was one of the two prisoners who joined Lahay in reporting their counsel to the bar association. *See Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983)(court may refer to unpublished opinions). If Lahay's assertions of this counsel's failure to confer, investigate witnesses, and allow Lahay to testify have merit, then, at least constructively, Lahay might have been denied counsel

> altogether, and the state proceedings would be unreliable. As in *Taylor*, if the district court on remand finds counsel's performance was deficient, it should consider carefully the question whether the extent of the deficiency requires a presumption of prejudice and should conduct such further proceedings as may be indicated.
>
> We vacate the district court's dismissal of Lahay's petition and remand for further proceedings consistent with this opinion.

Lahay v. Armontrout, 923 F.2d 578, 579 (8th Cir. 1991).

On May 15, 1991, Magistrate Bahn, after conducting a five-hour hearing to determine the deficiency, if any, of Lahay's counsel's performance during his state court trial, issued a report recommending that the petition for writ of habeas corpus be denied. Specifically, the Magistrate stated:

> The Court concludes that despite the fact that Walsh was not a totally effective counsel, it is the unqualified opinion of the Court that Lahay would have been convicted on the evidence presented to the jury. The Court did not find Lahay's version of Walsh's representation of him credible. Instead, the Court finds Lahay suffered no constructive total denial of counsel. The adversarial process was reliable. Walsh's performance was not so deficient as to require a presumption that Lahay was prejudiced at trial.

Petitioner filed objections to the Magistrate's Review and Recommendation arguing that the evidence adduced at the hearing before Magistrate Bahn supports a finding that petitioner's counsel, Mr. Walsh, was so ineffective that he was constructively denied counsel altogether and was thereby prejudiced. In particular petitioner argues that the evidence reflected that Mr. Walsh (1) failed

to consult with petitioner before trial; (2) failed to investigate potential witnesses; and (3) failed to permit the petitioner to testify in his own defense.

Respondent urges the Court to defer to the credibility determinations made by the Magistrate. Respondent further contends that (a) Mr. Walsh sufficiently met with petitioner prior to trial; (b) Mr. Walsh did investigate the testimony of Kevin Cole; (c) Mr. Walsh did attempt to interview Susan Hilt; (d) petitioner failed to demonstrate facts to give rise to a duty of counsel to investigate the LaPlantes; and (e) petitioner had an accurate understanding of his right to testify.

The Court has engaged in a de novo review of the record. The evidence reflects that Mr. Walsh consulted Lahay at least four time prior to trial. Mr. Walsh testified that he did investigate Kevin Cole as a potential witness but decided not to call him as a witness at trial. In addition, the evidence showed that Mr. Walsh wanted Susan Hilt to testify but her attorney refused her appearance because she also was charged with the crime. Moreover, Mr. Walsh testified that he advised Lahay that he had a right to testify. As to credibility of the witnesses, the Court defers to the Magistrate's determination. The Court concurs with the Magistrate's findings in that Lahay suffered no constructive total denial of counsel and the adversarial process was reliable.

Accordingly, the Court finds that Lahay failed to demonstrate a breach of duty by trial counsel or resulting prejudice as mandated by *Strickland v. Washington*, 466 U.S. 668 (1984).

After careful consideration,

IT IS HEREBY ORDERED that petitioner's objections are overruled.

IT IS HEREBY FURTHER ORDERED that the Magistrate's Review and Recommendation is sustained, adopted, and incorporated herein.

IT IS HEREBY FURTHER ORDERED that the petition of Gregory Lahay for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

Dated: July 30, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GREGORY LAHAY,	)	
	)	
Petitioner,	)	
	)	No. 89-0469C(3)
v.	)	
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

MAGISTRATE JUDGE'S REVIEW AND RECOMMENDATION

The Eighth Circuit Court of Appeals remanded subject case to the District Court so that it might conduct a hearing to determine the deficiency, if any, of appellant Gregory Lahay's counsel's performance during his state court trial. Because the undersigned finds that the deficiencies in counsel's performance were not so great as to constitute a constructive denial of counsel, it is recommended that Lahay's federal habeas corpus petition, 28 U.S.C. § 2254, on the basis of ineffective assistance of counsel be DENIED.

Lahay claimed in his motion that his counsel failed to adequately confer with him before trial, failed to adequately investigate, failed to call his alibi witnesses, and failed to inform him that he had a right to testify at his trial. The District Court gave the factual findings of the Missouri state courts at Lahay's Rule 27.26 hearing a presumption of correctness. The state court believed counsel's testimony that he had met with Lahay several times, adequately investigated the case, reasonably decided not to call the alibi witness who stated that he would perjure himself, and informed Lahay that he had a right to testify.

The Court of Appeals indicated that in some cases the presumption of correctness of the state court findings of fact might be rebutted citing *Richmond v. Ricketts*, 774 F.2d 957, 961-62 (9th Cir. 1988) and *Laws v. Armontrout*, 863 F.2d 1377, 1381 (8th Cir. 1988).

Further, the Court of Appeals made a rather poignant finding that, "We find the requisite conditions exist in the circumstances of trial counsel's disbarment and Lahay's challenge of counsel's statements." In effect, the reviewing courts found fault with the credibility of Lahay's counsel and, indeed, this alleged lack of credibility was one of the three factors in ultimately causing Lahay's counsel's disbarment in Missouri.

Pursuant to the instructions of the Court of Appeals, this Court conducted a five hour hearing wherein the state case against Lahay was virtually entirely replayed. (The original case including the selection of a jury, took only a day and a half).

At the hearing, Lahay reiterated his charges that he had very brief exposure to his trial counsel, John Walsh. Lahay testified that he met Walsh for the first time at his suppression hearing. Lahay claimed that thereafter Walsh made only one visit to the county jail prior to trial, which lasted one-half hour. Immediately prior to trial he said that he spent some 45 minutes with Walsh. Lahay further claimed several unanswered phone calls and letters to Walsh.

Lahay admitted that he had talked with Robert Babbione, his prior defense counsel, two or three times before Walsh took over. Notes from these conversations were in the file that was handed over to Walsh. Babbione initiated investigations of potential witnesses, began preparing for trial and endorsed Kevin Cole as an alibi witness.

Robert Babbione, former public defender, testified for the appellant and indicated that he had contacted alibi witness Cole

through Greg Hill, one of his investigators. Cole had told the investigator that he was with Lahay from 8:00 a.m. to 6:00 p.m. on the date of the crime. He then endorsed Cole as an apparent alibi witness and indicated that he was going to defend the case on the basis of alibi or mistaken identification.

Kevin Cole appeared via a habeas corpus writ ad testificandum and did testify that Lahay was with him on the date of the crime from 8:00 a.m. until 5:00 to 5:30 p.m. He said they were moving furniture, but at all times Lahay was near him and was not at the scene of the crime. Cole testified that he wanted to testify for Lahay at the state trial. However, he did not show up at the trial scene until "the trial was over." Cole admitted he knew the trial date, having been informed the night before. He did not go to the first day of the trial, but stated he appeared at the courtroom at 3:30 p.m. on the second day when the trial was over. Cole, at best, was an incredible witness.

The state produced Robert Wilson, who was the victim of the crime. Wilson testified that he had been out signing a bond for Susan Hilt's husband. He had started to the courthouse and then came back to his house to get some papers. When he arrived at his home, Susan Hilt was at his back door and petitioned him not to come in. He went in any way and was accosted by a man with a gun, who he recognized as Lahay right away. He testified that he had seen Lahay on quite a few occasions and knew him rather well. He stated that was hit up beside the head with a pistol and then hit with a rifle several times until it broke. Wilson further state that he had told the police immediately that his assailant was Greg Lahay.

John Orando, a captain of the St. Ann's Police Department testified. He stated that he went to the Wilson residence on March 4, 1983, at 4:30 p.m., pursuant to a complaint. He noticed Wilson's assault marks and dried blood thereon. Orando testified that Wilson claimed that Greg Lahay had assaulted him. The police report

indicated that Lahay and Susan Hilt were subsequently arrested by the Woodson Terrace Police and taken back to St. Ann. Captain Orando stated that Hilt verified the complainant's story. For some unexplained reason, it was developed that Lahay was not charged with the crime for a couple of months.

The state produced John Walsh, defense attorney. Walsh, although having been disbarred in Missouri was still admitted to practice in the State of Illinois. Walsh testified that he had been an assistant prosecuting attorney in St. Louis County from 1977 to 1981. At that time he had tried about 25 cases. He became a public defender thereafter, wherein he testified that he had tried some 30 cases.

Walsh was appointed to represent the appellant, after Robert Babbione resigned from the public defender's office. He claimed that he had disqualified the original trial judge and was given Judge Milton Saitz. He said he saw Lahay at least four times prior to trial. After their initial meeting at the suppression hearing, he met with him three more times. The fourth meeting took place the weekend before Lahay's trial.

Walsh testified as to having taken the victim Wilson's deposition. This was introduced as Respondent's Exhibit C. This would be considered an unusual procedure for a defense counsel because the common feeling among criminal defense attorneys is that depositions of witnesses assist the state in having a dress rehearsal. He claimed he was seeking to impeach Wilson for being number one an unlicensed bondsman and for being involved in the sale of drugs.

Walsh said that Lahay had presented Cole as an alibi witness and that he had contacted Cole by phone. He said that Cole said, "What does Greg want me to say — tell me what to say and I'll say it." He testified that Cole did not mention the furniture moving, but

concluded by saying, "I'll say anything Greg wants." Walsh did not call Cole as a witness in Lahay's trial.

Indeed, Walsh called no witnesses at Lahay's trial. Walsh noted that he wanted Susan Hilt to testify, but her attorney refused her appearance because she too had been charged with the crime involved. Walsh's theory at trial was to hold the state to its burden of proof, attack the credibility of the state's witnesses and create reasonable doubt in the minds of the jurors. Walsh admits advising Lahay not to testify on his own behalf because his prior convictions would come out. Walsh claimed that he did advise Lahay that he had a right to testify if he chose to run the risk. According to Walsh, Lahay made an informed and voluntary decision not to testify.

Walsh conceded his disbarment in Missouri based upon a failure to represent a traffic client in Illinois by missing a court date; refusing to participate in a capital murder case; and alleged incredibility in the cases of inmates Lahay, Taylor and Grayson. Actually, Walsh claimed that he surrendered his license because he was leaving the state and did not want to become involved in CLE requirements and he was too financially strained to pay bar membership dues. He claimed he can still practice in Illinois and presently manages a motel over there.

This Court was impressed with the fact that the proof of Lahay guilt was somewhat overwhelming. Hilt, if anything, a friend to Lahay, told the police that Lahay committed the crime and signed a written statement to that effect. Lahay was also recognized at the crime scene by the victim's neighbor as well as by the victim himself. Further, Lahay, in his later conversations with Walsh, told Walsh he was involved in the crime. Walsh testified that it was obvious to him that Lahay had committed the crime but that this did not prevent him from trying his hardest to defend Lahay.

The Court concludes that despite the fact that Walsh was not a totally effective counsel, it is the unqualified opinion of the Court

that Lahay would have been convicted on the evidence presented to the jury. The Court did not find Lahay's version of Walsh's representation of him credible. Instead, the Court finds Lahay suffered no constructive total denial of counsel. The adversarial process was reliable. Walsh's performance was not so deficient as to require a presumption that Lahay was prejudiced at trial. No further proceedings are indicated at this time.

Dated this 15 day of May, 1991.

_____

U.S. MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 89-2867

GREGORY LAHAY,	*
	*
Appellant,	*
	*
v.	*
	*
Bill Armontrout,	*
	*
Appellee.	*

Submitted: Oct. 9, 1990.

Decided: Jan. 9, 1991.

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and STUART, Senior District Judge.

HENSLEY, Senior Circuit Judge.

Gregory Lahay appeals from the district court's dismissal of his federal habeas corpus petition, 28 U.S.C. § 2254, which was founded on his claim of ineffective assistance of counsel. We vacate the dismissal and remand for an evidentiary hearing.

A Missouri Circuit Court convicted Lahay of second-degree assault, first-degree burglary, stealing without consent, and armed criminal action. The court sentenced him as a persistent offender to concurrent sentences of ten years, thirty years, fifteen years, and life imprisonment. After the Missouri Court of Appeals affirmed the judgment and the sentence, *State v. Lahay*, 687 S.W.2d 604 (Mo.Ct.App. 1985), Lahay filed a motion for post-conviction relief under Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988). In that motion Lahay claimed ineffective

assistance of trial counsel for failing to confer with him before trial, to investigate and call witnesses, and to inform Lahay of his right to testify at trial. At the Rule 27.26 hearing, Lahay's trial counsel testified that he had met with Lahay several times to discuss the case, that he interviewed and decided not to call a potential alibi witness who stated he would perjure himself to exonerate Lahay, and that he informed Lahay of his right to testify in his own behalf.

The state court accepted counsel's statements and denied the motion. During the pendency of his appeal to the Missouri Court of Appeals, Lahay joined with two other prisoners to file complaints with the Missouri Bar Association claiming that the attorney had committed perjury at each of their Rule 27.26 hearings. The bar committee filed a three-count information with the Missouri Supreme Court against the attorney. One count alleged perjury in the three Rule 27.26 hearings. The other two counts alleged the attorney failed to appear in court to represent a client after being paid and failed to take any steps to defend a client charged with capital murder. The attorney surrendered his license, and the court accepted the surrender and disbarred the attorney without making any finds on the charges.

The Missouri Court of Appeals affirmed the denial of Lahay's motion and held that the trial court's findings were not clearly erroneous. *Lahay v. State*, 752 S.W.2d 65 (Mo.Ct.App. 1988). Lahay then filed his § 2254 petition with the United States District Court for the Eastern District of Missouri, which assigned the matter to a magistrate. The magistrate found that the factual findings by the Missouri state courts were entitled to a presumption of correctness, that Lahay failed to prove his counsel was ineffective, and that Lahay could not obtain federal habeas relief based on his claim that the state knowingly used perjured testimony by his counsel in the Rule 27.26 hearing. The district court adopted the magistrate's findings and dismissed the petition with prejudice.

While the district court perhaps correctly found Lahay's claim that counsel committed perjury such that Lahay did not receive a fair Rule 27.26 hearing is not a basis for federal habeas relief, lack of fair hearing will rebut the presumption of correctness of the state court's factual findings. 28 U.S.C. § 2254(d)(6). If conditions exist casting doubt on the reliability of the state court findings of fact, the presumption of correctness may be rebutted, and the petitioner is entitled to an evidentiary hearing to review the findings. *Richmond v. Ricketts*, 774 F.2d 957, 961-62 (9th Cir. 1985); *Laws v. Armontrout*, 863 F.2d 1377, 1381 (8th Cir. 1988). We find the requisite conditions exist in the circumstances of trial counsel's disbarment and Lahay's challenge of counsel's statements.

> A petitioner claiming ineffective assistance of counsel must show that not only was counsel's performance deficient, but also that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984). Prejudice may be presumed, however, if there has been a constructive denial of counsel altogether, *id.* at 692 [104 S.Ct. at 2067], or if counsel's performance renders the adversarial process unreliable. *Chadwick v. Green*, 740 F.2d 897, 900 (1984) [sic].

Taylor v. Armontrout, No. 89-2604, slip op. at 3 [915 F.2d 1576 (table)] (8th Cir. 1990).

This court is considerate of the same concerns expressed in the above-cited case because Taylor was one of the two prisoners who joined Lahay in reporting their counsel to the bar association. *See Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983) (court may refer to unpublished opinions). If Lahay's assertions of his counsel's failure to confer, investigate witnesses, and allow Lahay to testify have merit, then, at least constructively, Lahay might have been denied counsel altogether, and the state proceedings would be

unreliable. As in *Taylor*, if the district court on remand finds counsel's performance was deficient, it should consider carefully the question whether the extent of the deficiency requires a presumption of prejudice and should conduct such further proceedings as may be indicated.

We vacate the district court's dismissal of Lahay's petition and remand for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM PHILLIP TAYLOR,	)	
	)	
Plaintiff,	)	
	)	No. 89-472C(3)
v.	)	
	)	
BILL ARMONTROUT,	)	
	)	
Defendant.	)	

MAGISTRATE'S REPORT AND RECOMMENDATION

The petition of William Phillip Taylor for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, was referred to the undersigned United States Magistrate for review and recommended disposition pursuant to 28 U.S.C. § 636(b).

Petitioner was found guilty in the Circuit Court of St. Louis County, after trial by a jury, of receiving stolen property. Petitioner was sentenced as a persistent offender to fifteen years' imprisonment. Petitioner's petition was affirmed upon direct appeal. *State v. Taylor,* 691 S.W.2d 379 (Mo. App. 1985). Petitioner then filed a Missouri Supreme Court Rule 27.26 motion. Petitioner's rule 27.26 motion was denied after an evidentiary hearing. On appeal, the Missouri Court of Appeals affirmed the denial of the rule 27.26 relief. *Taylor v. State,* 753 S.W.2d 319 (Mo. App. 1988). Petitioner was released from custody on a medical parole on December 15, 1989, however, he is subject to return to the Missouri Department of Corrections upon recovery, or at any other time the Board of Probation and Parole deems appropriate before expiration of his

sentence on October 4, 1997. Consequently, petitioner remains in custody for purposes of habeas review.

Petitioner's petition for writ of habeas corpus was initially denied by U.S. District Judge William Hungate. However, upon appeal to the Eighth Circuit, this cause was remanded to the district court for the purpose of conducting an evidentiary hearing on the issue of whether petitioner received ineffective assistance of counsel for counsel's alleged failure to consult with petitioner, interview or call witnesses and not allowing Taylor to testify on his own behalf at trial. A petitioner claiming ineffective assistance of counsel must show that, not only was counsel's performance deficient, but also that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). Prejudice may be presumed, however, if there has been a constructive denial of counsel altogether, *id.* at 692, or if counsel's performance renders the adversarial process unreliable. *Chadwick v. Green*, 740 F.2d 897, 900 (1984). If Taylor's counsel failed to confer, investigate witnesses and allow Taylor to testify, he would have constructively been denied counsel altogether, and the process would have been unreliable. The issue before this court is whether counsel's performance was deficient and if so, whether counsel's performance was prejudicial.

A hearing was held before the undersigned on January 28, 1991. Any findings of fact equally applicable as a conclusion of law is hereby adopted as such, and conclusion of law applicable as a finding of fact is hereby adopted as such.

FINDINGS OF FACT

1. On March 16, 1983, in the Circuit Court of St. Louis County, Missouri, an information was filed against petitioner, William Phillip Taylor, charging him in the alternative with Class C felony stealing, § 570.030, R.S.Mo. (1986), and the Class C felony of receiving stolen property, § 570.080, R.S.Mo.

(1986). Petitioner was charged as a persistent offender pursuant to § 558.016.3, R.S.Mo. (1986). The charges stem from a transaction in which the petitioner allegedly sold a stolen microscope to a Mr. Bishop.

2. An amended information was filed September 16, 1983.

3. The cause proceeded to jury trial on October 31, 1983 and on November 1, 1983 in the Circuit Court of St. Louis County, Missouri, the Honorable Robert Lee Campbell presiding.

4. The jury found petitioner guilty of the crime of receiving stolen property and was sentenced as a persistent offender to serve fifteen years' imprisonment on November 29, 1983.

5. Petitioner's conviction was affirmed by the Eastern District Court of Appeals in *State v. Taylor,* 691 S.W.2d 371 (Mo. App. 1985). Petitioner was represented at trial by Assistant Special Public Defender, John M. Walsh.

6. On November 24, 1986, petitioner filed a motion to vacate his conviction and sentence pursuant to Supreme Court Rule 27.26 (repealed effective January 1, 1988). A two-day evidentiary hearing was held on April 3, 1987 and on or about June 12, 1987. Petitioner's motion was denied and the Honorable Melvin W. Wiesman entered findings of fact and conclusions of law on September 3, 1987.

7. The Missouri Court of Appeals, Eastern District, affirmed the denial of the Rule 27.26 relief in *Taylor v. State,* 753 S.W.2d 319 (Mo. App. 1989).

8. On March 16, 1989, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern Division of Missouri.

9. The petitioner's writ of habeas corpus was referred to the undersigned United States Magistrate for review and recommended disposition, and the undersigned recommended that the petition be denied on August 9, 1989.

10. After objections to the recommendation were filed by petitioner on August 18, 1989, the Honorable William L Hungate, U.S. District Court Judge, adopted the undersigned's review and recommendation and ordered that the petition be denied with prejudice on September 7, 1989.

11. Petitioner filed his notice of appeal on August 18, 1989 in the United States Court of Appeals for the Eighth Circuit.

12. On July 11, 1990, the United States Court of Appeals for the Eighth Circuit vacated the District Court's dismissal of the petition and remanded the cause for an evidentiary hearing on petitioner's claim of ineffective assistance of counsel for failure to confer, failure to call witnesses and refusing to allow petitioner to testify in his own defense.

13. Petitioner was first represented by Mary Dames of the St. Louis, County Public Defenders Office, who was subsequently replaced by Stormy White, also of the St. Louis, County Public Defenders Office. After the St. Louis County Public Defenders Office disqualified itself, petitioner was represented by several attorneys from the Office of the Special Defender. Ultimately petitioner was appointed John M. Walsh, who represented petitioner at trial.

A. Consultation

14. Mr. Walsh met with petitioner for approximately five minutes on September 25, 1983, before the hearing in front of Judge Nolan, and then again for approximately 25 minutes on October 31, 1983, immediately prior to the trial of petitioner's

case. Although Mr. Walsh testified before this court and at petitioner's rule 27.26 hearing that he had met with petitioner on at least five occasions to discuss his case and establish a trial strategy in the representation of petitioner, the records and testimony fail to support these claims.

15. The affidavits and testimony submitted by Jean Hollander, Administrative Assistant at the St. Louis County Jail, established that the visitors' register for the period of January 1 through November 1, 1983 indicates Mr. Walsh did not visit petitioner while he was incarnated at that institution. Similarly, the testimony and records of Betty Gagnon, custodian of records at the Adult Correctional Institution, show that for the period of January 1 through December 31, 1983, there was no record of attorney Jack Walsh, John Putzel, Stormy White or Mary Dames visiting inmate William Phillip Taylor during the year of 1983. Both institutions utilize procedures by which visiting attorneys must register at the time they enter the institution indicating which prisoners they have come to see.

16. The Court finds John Walsh's testimony that he had met with petitioner at least five separate times for a period of up to three hours not credible. Respondent has presented no documentation such as bills for service, case notes, time sheets or any evidence other than the testimony of John Walsh to document John Walsh's claims that he met with petitioner on at least five occasions.

17. Despite numerous requests by petitioner, John Walsh failed to meet with petitioner other than the two occasions specified in finding number 14, to discuss his case.

B. Investigation

18. Petitioner advised John Walsh of potential witnesses, including Aurora Daugherty, Robert L. Turner, the manager of

Hotel 6, Bryan Fatterer, of Houston, Texas, John Doe, the owner-manager of advance instruments in San Antonio, Texas, petitioner's son, David Hadaway Taylor, Richard Soto, and a bank teller with the Southwest Bank of El Paso, Texas. (See petitioner's exhibit 1.)

19. Petitioner produced David Taylor at the evidentiary hearing.

20. Aurora Daugherty, Robert, Turner, Bryan Fatterer, John Doe, and Richard Soto unavailable to testify at the evidentiary hearing.

21. Petitioner testified before this court and at his rule 27.26 hearing, that he informed John Walsh that Miss Daugherty would testify to petitioners address in Houston, and he used his own name and did not act as though he was a fugitive; thus rebutting the inference that petitioner was a fugitive from the state of Missouri. (Tr. Petitioner's rule 27.26 hearing p. 61-62)

22. Petitioner informed John Walsh that Mr. Turner, the manager of the Motel 6, where petitioner often stayed and who maintained the motel records, would be able to verify petitioner's residency.

23. Petitioner informed Mr. Walsh that Mr. Richard Soto would testify that on October 5, 1982, he turned two microscopes over to petitioner, as well as one other that had been sold to Mr. Bishop at an earlier date in 1976. Mr. Turner would be able to testify that he say Mr. Soto sell the microscope to petitioner. The transactions demonstrate that the microscope was received in what amounted to a transaction in the normal course of business and not under circumstances that would cause suspicions that the microscope was stolen.

24. Petitioner testified that Mr. Fatterer would provide documents and testimony verifying the fact that petitioner resided on lease

at 1301 Richmond Avenue in Houston, Texas from September 1, 1978 through September 1, 1979, and that would have verified that when giving Mr. Bishop a bill of sale, he was giving the correct address, name, phone. (Tr. 64)

25. Petitioner provided Mr. Walsh the name of the owner of Advanced Instruments on St. Mary's Street in San Antonio, Texas and informed Mr. Walsh that he could verify that defendant had given the microscope to him for repair nearly a year before selling it to Mr. Bishop. This would show that the microscope was in petitioner's possession prior to the time that it was alleged to have been stolen from the hospital.

26. The court finds credible petitioner's testimony relating to subject matter of the witnesses' testimony.

27. Petitioner's adopted son, David Taylor, testified at the evidentiary hearing that he was available to testify at trial on October 31, 1983 and November 1, 1983, and could have verified petitioner's residence at the time of the sale of the microscope at issue to Mr. Melvin Bishop, thereby refuting, or raising reasonable doubt, to the prosecutor's inference of criminal intent, in that the prosecution inferred that petitioner gave Mr. Bishop a false address and telephone number in an attempt to conceal himself from Mr. Bishop and the authorities.

28. John Walsh testified that he had investigated petitioner's case, finding that most of the addresses provided by petitioner for witnesses were either wrong or not current. Further, he testified that the Office of the Public Defender had previously investigated petitioner's case for a period of eight months and were unable to locate many of petitioner's prospective witnesses. Mr. Walsh testified that he had attempted to mail various letters to the addresses provided by petitioner which were returned as undeliverable.

After reviewing both the testimony before this court and testimony provided before the Honorable Melvyn W. Weisman in petitioner's rule 27.26 motion, the court finds Mr. Walsh's testimony inconsistent and therefore not credible. Respondent has offered no documentation such as billing records, investigative notes, case notes, reports from investigators or correspondence to substantiate that any investigation took place.

29. Mr. Walsh stated that he was unable to locate David Taylor, petitioner's son, because Mr. Taylor [sic] he was allegedly in Europe at the time of the trial. He further stated that had David Taylor or the other witnesses been available to testify Mr. Walsh would not have called them to testify. Mr. Walsh stated that the prosecutor had evidence to refute evidence petitioner might have presented through these witnesses. Mr. Walsh failed to provide specific information to this court or the state court regarding the nature of the prosecution's evidence nor explained how it would rebut the testimony of petitioner's witnesses. After careful review of the testimony given at both hearings, the court finds Walsh's testimony vague and unsubstantiated, and therefore not credible.

C. Trial

30. Mr. Walsh informed petitioner of his right to testify in his own behalf and further advised petitioner of the ability of the prosecution to cross-examine and impeach petitioner by and through the use of his prior convictions.

31. Petitioner made his own decision after receiving advice of counsel to exercise his right not to testify. Mr. Walsh did not prevent petitioner from testifying in his defense.

32. During representation of defendant at trial, Mr. Walsh did not call any witnesses, he advised petitioner not to testify on his

own behalf, and he did not submit any documents or other tangible evidence to be considered by the jury.

33. Mr. Walsh failed to subpoena the production of the stolen microscope, a key piece of evidence, due to his good faith belief that witnesses for the prosecution were bringing the microscope with them from Tennessee.

34. Petitioner, together with two other prisoners, filed a petition with the Missouri Bar Association claiming that Mr. Walsh had failed to consult with them prior to their trials and had committed perjury in subsequent proceedings under Missouri Rule 27.26. (Petitioner's Exhibit 4)

35. The bar committee for the 22nd Judicial Circuit advised Mr. Walsh that the complaint had been referred to Division 3 of the 22nd Judicial Circuit Bar Committee for hearing. Division 3 of the 22nd Judicial Circuit Bar Committee voted to have the matter of Mr. Walsh's complaint referred to formal hearing, and a notice of formal hearing has been served upon the attorney appointed to represent Mr. Walsh. (Petitioner's Exhibits 8 and 9)

36. Prior to the formal hearing, Mr. Walsh advised the committee that he would surrender his license to practice law in the state of Missouri and was subsequently disbarred by the Missouri Supreme Court on January 15, 1988. (Defendant's Exhibits 2, 3, 4, 5; Petitioner's Exhibit 5)

CONCLUSIONS OF LAW

Petitioner assets that he received ineffective assistance of counsel because trial counsel failed to confer with him, failed to investigate key witnesses and forcibly prevented defendant from testifying on his own behalf. In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show

that (1) his attorney failed to exercise the customary skill and diligence that a reasonable competent would perform under similar circumstances; and (2) that he was thereby prejudiced. *Sanders v. Trickey,* 875 F.2d 205, 207-08 (8th Cir. 1989). It is well settled that an attorney must consult with his client.

> Counsel should confer with his client without delay and often as necessary to elicit matters of defense or to ascertain that potential defenses are available.

United States v. DeCoster, 159 U.S. App. D.C. 326, 487 F.2d 1197, 1203 (1973). The testimony and evidence adduced at the hearing demonstrates that petitioner's trial counsel, John M. Walsh, who entered his appearance one month prior to trial, consulted with defendant for only five minutes before the hearing with Judge Nolan on September 25, 1983 and with petitioner again on October 31, 1983 for approximately 25 minutes before the trial of petitioner's case. Despite Mr. Walsh's claims that he had visited five times to discuss the case and trial strategy, testimony was given by the custodian of records for the two prison facilities where Mr. Taylor was incarcerated awaiting trial. These individuals testified that all visitors to the prison, including attorneys are to sign visitor registration prior to entering the facility. A review of these records failed to reveal any indication that Mr. Walsh had entered either facility in 1983.

The court finds John Walsh's testimony not to be credible and Respondent failed to submit any evidence which corroborates John Walsh's claims relating to consultation with his client or investigation of his case. The evidence shows that Mr. Walsh did not exercise the conduct of a reasonably competent attorney under the same circumstances in consulting with his client in order to develop a trial strategy. Petitioner was prejudiced by Mr. Walsh's failure to consult. A prisoner's right to consult is right than the right to have someone who happens to be an attorney standing beside

him at trial. *Strickland v. Washington*, 466, U.S. 668, 685; 104 S.Ct. 2052, 2063; 80 L.Ed.2d 764 (1984). The record indicates that Mr. Walsh presented no evidence on behalf of his client at trial. No defense witnesses were called, no documentary or other tangible evidence was submitted by defendant, and defendant did not himself testify. Defendant attempted to inform Mr. Walsh of possible witnesses by both letter and conversations. However, defense counsel failed to follow up on these witnesses and failed to properly investigate them. Further, Mr. Walsh's failure to consult with his client, caused him to be unaware of significant differences between the microscopes stolen from Memphis Hospital South, Memphis, Tennessee and the microscopes sold by petitioner to Mr. Bishop.

Mr. Walsh's failure to consult with petitioner also caused him to be unaware of the identity of witnesses who, if called, could have verified petitioner's residence in Texas. The prosecution contended that petitioner deliberately concealed himself from the authorities and Mr. Bishop [sic] by supply Mr. Bishop with the false address and telephone number in Houston, Texas. Due to Mr. Walsh's failure to consult with petitioner, he was unaware of petitioner's adopted son, David Taylor, who was available to testify and verify the address given by petitioner to Mr. Bishop. Petitioner has demonstrated that he was prejudiced by the ineffective assistance of his trial counsel, and there exists reasonable possibility that the outcome of the trial would have bene different had petitioner met with trial counsel. Mr. Walsh's failure to investigate this matter created a "factual vacuum," and petitioner was prejudiced thereby. *Nealy v. Cabana*, 765 F.2d 1173 (5th Cir. 1985). It is the finding of this court that Mr. Walsh's lack of performance arises to a level of constructive denial of counsel. *Strickland, supra* at 692. Accordingly,

IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus be granted.

The parties are advised that they have eleven days to file written objections to this review and recommendation pursuant to 28 U.S.C. § 636(b).

Robert D. Kingsland
UNITED STATES MAGISTRATE

Dated: February 7, 1991.